UNITED STATES OF AMERICA	)	
	)	**SUPPLEMENTAL RULING:**
v.	)	**Defense Motions For Findings of Not**
	)	**Guilty - RCM 917**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**24 July 2013**
Fort Myer, Virginia 22211	)	

This ruling supplements the Court's 18 July 2013 ruling and addresses the Defense motions under RCM 917 for findings of not guilty for specifications 4, 6, 8, 12, and 16 of Charge II (Stealing, Purloining, or Knowingly Converting (SPKC) Records or Things of Value Belonging to the United States, in violation of 18 U.S.C. §641 and Article 134, UCMJ).

Defense Position: The Defense moves the Court to enter a finding of not guilty in accordance with RCM 917 because:

1. In each of the specifications 4, 6, 8, 12, and 16, the Government charged the accused with SPKC the actual databases themselves and did not allege in the charge that the accused SPKC the records in the database, or a copy of the records in the database, or the information in the records. This is a fatal variance between what is charged and the evidence presented.

2. Even if properly charged, intangible property, such as information, is not within the scope of 18 U.S.C. §641.

3. The Government has not proved substantial or serious interference with the Government's use and benefit of the charged databases. The databases, record, and information remained available for the Government's use without change after the alleged SPKC by the accused.

4. The Government has failed to adduce any value of copies or information. Should the Court find that specifications 4, 6, 8, 12, and 16 properly charge SPKC of records, copies of records, or information, the Government has failed to adduce evidence of the value of the records, copies, or the information contained therein.

5. For specification 16 of Charge II, the Defense further alleges that the Government has failed to present evidence that the .mil addresses found on the accused's personal Macintosh (MAC) computer were the U.S. Forces – Iraq Microsoft Outlook/SharePoint Exchange Server global address list (USF-I GAL). The Defense further alleges that even if the accused downloaded a GAL, the Government has failed to introduce evidence that he acted "with intent to deprive the government of the use and benefit of the records" that the accused's conduct was wrongful, or that the accused's conversion of the GAL caused serious or substantial interference with the Government's ownership rights as the GAL was available for use with no change after the accused allegedly converted it.

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Government Position: The Government opposes the Defense motion arguing that:

1. Specifications 4, 6, 8, 12, and 16 of Charge II each identify the records in the relevant database that the accused is charged with SPKC. Information is inherent within the definition of record and database. Thus, there is no fatal variance between pleading and proof.

2. The contents and information contained in Government records determine the criminality of the SPKC of the records more than the form of the records.

3. For conversion purposes, the deprivation of the Government's right to protect the contents of confidential classified information can be a misuse that seriously and substantially interferes with the Government's property rights.

4. The Government provided evidence of value in excess of $1000.00 for specifications 4, 6, 8, 12, and 16 through the testimony of Mr. Lewis, by evidence of the cost of creating the records at issue, and the costs of creating and maintaining the databases at issue via the database management systems, infrastructure, and software. The cost of the database management infrastructure is appropriate evidence of value because without it, the records would not exist and could not be downloaded.

5. With respect to specification 16 of Charge II, the Government argues that evidence presented by the Government that the accused created a tasker to "exfiltrate" the GAL after receiving a 7 May 2010 tweet from WikiLeaks seeking .mil addresses, that the accused extracted the 74,000 addresses from the USF-I GAL and placed the extracted information on his personal MAC computer, together with evidence of his history of downloading classified government records and information, transferring it to personal digital media, and sending the records and information to WikiLeaks and testimony from CW4 Nixon that the USF-I GAL contained names and email addresses connected to the "Iraq.centcom.mil" domain establish that the 74,000 email addresses came from the USF-I GAL pool and that the GAL contains usernames, domains, alias addresses, certificates, unit, and phone numbers and reveals unit organizations structure, information defined as "sensitive" per Army Regulations (AR) 25-2 and 530-1 establishes that the accused SPKC the USF-I GAL from the possession of the United States with intent to deprive the United States of the stolen property and that his conduct was wrongful.

6. In part B (1-5) of its brief (AE 599), the Government identified the evidence admitted to prove each of the elements for specifications 4, 6, 8, 12, and 16 of Charge II. The Court has reviewed all of the testimony and examined the evidence set forth by the Government for each specification as well as the briefs and oral argument presented by the parties.

Oral Argument: On 18 July 2013, the Court heard oral argument on this motion and received AE 610, a Property/Value of Property Chart from the Defense. On 19 July 2013, the Court received Prosecution Notification to the Court: GAL Evidence (AE 612). On 20 July 2013, the Court held additional oral argument. During this oral argument, the Government conceded that the evidence for specifications 4 and 6 of Charge II shows that the CIDNE-I and A sigacts the accused is charged with SPKC comprised approximately 25% of the CIDNE-I and A databases. The Government also advised that for specification 16 of Charge II, the Government was going

forward only with the 74,000 addresses allegedly downloaded by the accused and not that the accused SPCK the email addresses of all 160,000 users on the USF-I GAL. The Government moved to amend specifications 4, 6, and 16 of Charge II to except "to wit:" and substitute "to: wit, a portion of" for each specification. The Government further moved the Court to allow evidence of a pro rata share of the database management costs for each specification. The Defense opposed the amendments as major changes under RCM 603(d) and moved the Court for a mistrial under RCM 915 with respect to specifications 4, 6, and 16 because the Defense had no opportunity to cross examine the valuation witnesses with respect to pro rata share. The Defense argues a mistrial is manifestly necessary in the interest of justice because the Government's action to amend specifications 4, 6, and 16 of Charge II after presentation of the evidence on the merits casts substantial doubt over the fairness of the proceedings.

Findings of Fact:

1. Specifications 4, 6, 8, 12, and 16 of Charge II all have the same charging structure:

In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about [applicable dates], steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit:

Specification 4: the Combined Information Data Network Exchange Iraq database containing more than 380,000 records;

Specification 6: the Combined Information Network Exchange Afghanistan database containing more than 90,000 records;

Specification 8: a United States Southern Command database containing more than 700 records;

Specification 12: the Department of State Net-Centric Diplomacy database containing more than 250,000 records;

Specification 16: the United States Forces – Iraq Microsoft Outlook/SharePoint Exchange Server global address list;

of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

2. Relevant instructions the Court will give for the 18 U.S.C. §641 offenses are:

To "steal" means to wrongfully take money or property belonging to the United States government with the intent to deprive the owner of the use and benefit temporarily or permanently.

"Wrongful" means without legal justification or excuse.

To "purloin" is to steal with the element of stealth, that is, to take by stealth the property of the United States government with intent to deprive the owner of the use and benefit of the property temporarily or permanently.

A "taking" doesn't have to be any particular type of movement or carrying away. Any appreciable and intentional change in the property's location is a taking, even if the property isn't removed from the owner's premises. The accused did not have to know the United States government owned the property at the time of the taking.

A "conversion" may be consummated without any intent to permanently deprive the United States of the use and benefit of the property and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include the misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Not all misuse of government property is a conversion. The misuse must seriously and substantially interfere with the United States government's property rights.

"Value" means the greater of (1) the face, par, or market value, or (2) the price, whether wholesale or retail. A "thing of value" can be tangible or intangible property. Government information, although intangible is a species of property and a thing of value.

The market value of stolen goods may be determined by reference to a price that is commanded in the market place whether that market place is legal or illegal. In other words, market value is measured by the price a willing buyer will pay a willing seller. (The illegal market place is also known as a "thieves market".) "Cost price" means the cost of producing or creating the specific property allegedly stolen, purloined, or knowingly converted.

4. The "thieves market" may be used to establish value so long as the Government presents evidence of the value of the property or information at issue in the "thieves market". *U.S. v. Hood,* 12 M.J. 890 (A.C.M.R. 1982); *U.S. v. Oberhardt,* 887 F.2d 790 (7th Cir. 1989).

5. The Court takes judicial notice that Black's Law Dictionary (9th ed. 2009) defines a database in relevant part as "a compilation of information arranged in a systematic way and offering a means of finding specific elements it contains, often today by electronic means." The Court takes judicial notice that Black's Law Dictionary defines a record as "information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." Databases are supported by database management systems, infrastructure, and software.

6. The records the accused is charged with SPKC in specifications 4, 6, 8, 12, and 16 of Charge II are maintained on classified electronic databases. The databases, records, and information contained therein are accessible only to individuals with security clearances who have been approved by the Government to have access to the information. The structure of the databases allows multiple authorized users to access and extract the information maintained on the database simultaneously. The records in the database, and the information contained therein, may be extracted or downloaded from the database by authorized users, however, the records,

and information therein, remain in the database after extraction by user(s) in the same condition as they existed prior to the extraction.

7. Specification 16 of Charge II, charges the accused with SPKC the USF-I GAL. The evidence presented by the Government provides some evidence that 74,000 .mil addresses were found on the NIPR supply room computer in the peter.bigelow account and on the accused's personal MAC computer.

8. On 16 February 2012, the Defense filed a motion for a bill of particulars. In paragraph 10(a) and (b), the Defense asked the following with respect to the specifications charging a violation of 18 U.S.C. §641: (1) What specific theory of culpability does the government intend to rely upon? In other words, does the Government allege that PFC Manning "stole", "purloined" or "converted"? and (2) If the Government is alleging that PFC Manning stole, purloined, and converted the charged items, does each theory of culpability apply equally to every charged item? On 8 March 2012, the Government responded to paragraph 10(a) and (b) of the Defense request for bill of particulars with a paragraph arguing that it should not be directed to submit a bill of particulars because the defense was attempting to restrict the Government's proof at trial. In the paragraph the Government included the following sentence "Furthermore, the theft-related offenses alleged in this case are of specific, identified databases." In the bill of particulars, the Defense posed questions with regard to the Government's theory of prosecution. The Defense did not seek more specificity as to the items charged. Nor did the Defense seek clarification after receiving the Government's response. The Court finds the language of the specifications themselves, rather than the Government's bill of particulars, response provides the accused notice of what the accused is charged with SPKC.

Conclusions of Law:

1. 18 U.S.C. §641 was intended to encompass all forms of common law larceny. *Morissette v. United States*, 342 U.S. 246, 253 (1952). The statute encompasses SPKC of intangible information. Intangible information is "a thing of value" under 18 U.S.C. §641. *U.S. v. Matzkin,* 14 F.3d 1014 (4th Cir. 1994); *U.S. v. Lambert,* 446 F.Supp. 890 (D.C. Conn. 1978), *aff'd United States v. Girard,* 601 F.2d 69, 70 (2nd Cir. 1979); *U.S. v. Collins,* 56 F.3d 1416, 1420 and n. 3 (D.C. Cir. 1995) (While not central to our analysis, we note that every circuit, except one, dealing with this issue has held that intangible property falls within the purview of §641.), *See e.g. United States v. Jeter,* 775 F.2d 670, 680 (6th Cir. 1985) ("the Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities."), *cert. denied,* 475 U.S. 1142 ...(1986); *United States v. Croft,* 750 F.2d 1354, 1361 (7th Cir. 1984) (services rendered constitute a thing of value); *United States v. May,* 625 F.2d 186, 191-92 (thing of value includes flight time); *United States v. Girard,* 601 F.2d 69, 71 (2nd Cir. 1979) (content of a writing, while an intangible, is a thing of value), *cert. denied* 444 U.S. 871...(1979). [Note 3] The Ninth Circuit in *Chappell v. United States,* 270 F.2d 274 (1959), held conversion was limited to tangible chattels under §641. This holding, however, remains in doubt within the Circuit itself. *See United States v. Schwartz,* 785 F.2d 673, 681 n. 4 (9th Cir. 1986) ("this court has not cited *Chappell* in support of its limited interpretation of *thing of value* since that case was decided in 1959"). Even if SPKC intangible information included in a SPKC of tangible information were not an offense under 18 U.S.C. §641, it would constitute

an offense as charged in specifications 4, 6, 8, 12, and 16 under clauses one and two of Article 134, UCMJ.

2. Specifications 4, 6, 8, and 12 of Charge II, charge the accused with SPKC a specified database and a number of records contained within that database. Information is necessarily included within the definition of both record and database. Thus, specifications 4, 6, 8, and 12 of Charge II provide the accused notice that he is accused of stealing the information in the described records and databases described in the specifications and protect him from another prosecution for the same conduct. There is no material or fatal variance between the pleadings and the proof.

3. In specification 16 of Charge II, the accused is charged with SPKC the USF-I GAL. The fact that there were fewer email addresses found on the accused's computer than included in the USF-I GAL is not a material variance. The evidence presented by the Government provided some evidence to show that the USF-I GAL was produced by incorporating user data from the bottom up (brigade to division to USF-I) with the domain iraq.centcom.mil. Thus, a subset of the USF-I GAL, would be a lesser included offense for the fact-finder. There is no material or fatal variance between the pleading and the proof.

4. The Government has moved to amend specifications 4, 6, and 16 to conform with the evidence that the records, and information therein, allegedly SPKC by the accused were portions of the databases alleged to have been SPKC by the accused. The amendments proposed by the Government do not change the nature of the offenses, add a party, offense, or substantial matter not fairly included in the original specifications. The proposed amendments do not mislead the accused. The amendments make the offenses lesser included offenses of the original specifications. They are minor changes under RCM 603(a). The Court grants the Government's motion to amend specifications 4, 6, and 16 to except the words "to wit" and substitute the words "to wit: a portion of".

5. A stealing or purloining requires that the accused wrongfully take money or property belonging to the United States with the intent to deprive the owner of the use and benefit temporarily or permanently. The Government does not have to prove that the Government suffered a loss or was deprived of the use and benefit of the records, databases, or information therein, to prove a stealing or purloining for the 18 U.S.C. §648 specifications. The fact that the Government sustains no loss or actually receives some service or benefit as a result of the accused's action does not negate the accused's criminal intent. *U.S. v. Ayesh,* 702 F.3d 162, 169 n. 2 (4th Cir. 2012) (Indeed at least four circuits – the First, Fifth, Seventh, and D.C. Circuits – have found that the Government need not prove an actual loss to establish a violation of §641. *See United States v. Herrera-Martin,* 525 F.3d 60, 62, 64 (1st Cir. 2008) (affirming the conviction of a defendant who used another person's name and identifying information to obtain a federal housing voucher); *United States v. Milton,* 8 F.3d 39, 41, 44 (D.C. Cir. 1993) (affirming the convictions of two brothers who helped others submit false claims for back pay under a settlement agreement between an employer and the Equal Employment Opportunity Commission); *United States v. Barnes,* 761 F.2d 1026, 1027-28, 133 (5th Cir. 1985) (affirming the convictions of two defendants who applied for and authorized fraudulent livestock loans from the Farmers Home Administration, even though the money had actually been used to buy

livestock); *United States v. Bailey,* 734 F.2d 296, 298-301 (7th Cir. 1984) (affirming the conviction of a defendant attorney who had embezzled portions of loans used by the Farmer's Home Administration). *But see United States v. Collins,* 464 F.2d 1163, 1164-65 (9th Cir. 1972) (reversing a conviction under §641 after finding that the money that the defendant had stolen by forging and negotiating government-issued checks had belonged to a bank not the government)).

6. A "conversion" may be consummated without any intent to permanently deprive the government of the use and benefit of the property and without any wrongful taking. Not all misuse of government property is a conversion. The misuse must seriously and substantially interfere with the government's property rights. *Collins,* 464 F.2d at 1420; *U.S. v. May,* 625 F.2d 186, 192 (8th Cir. 1980) *quoting Restatement (Second) of Torts* §222A (One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.).

7. In this case, the Government elicited evidence that the Government maintained exclusive possession and stringent controls over the classified information, records, and databases charged in specifications 4, 6, 8, and 12 of Charge II. The Government authorized access to the information and records only by individuals to whom the Government had given appropriate security clearances. The Government maintained possession of the information and records on classified SIPR computers. The Government provided further evidence that the accused extracted and removed the classified records, and information therein, from the SIPR computer in the 2nd Bde SCIF, downloaded them to his own portable digital media or platform, removed the portable digital media and platform from the 2nd Bde SCIF, transferred the records, and information therein, to his personal portable digital media or platform in his private housing unit, and then transferred the records, and information therein, to WikiLeaks. The Court finds this to be some evidence of a misuse of Government records that could seriously and substantially interfere with the Government's property right to control the charged records, and information therein, to withstand a motion for a finding of not guilty under RCM 917. For specification 16 of Charge II, the Government is not pursuing a theory of conversion.

8. SPKC of electronic data doesn't compare neatly to cases where the defendant made photocopies of government records, replaced the originals, and SPKC the photocopies. With SPKC, there are no copies to steal until the accused accesses the digital information and makes the extraction. The original digital database and records remain in the database management system during and after extraction.

9. The Government has not charged the accused with SPKC a copy of Government records in the 18 U.S.C. §641 specifications. The Government is charging the accused with stealing and purloining the databases, electronic records, and information therein, at issue by accessing the relevant database, extracting the records from the database management system structure, placing the information on private platforms or digital media while in the 2nd Brigade Sensitive Compartmented Information Facility (SCIF) at Forward Operating Base (FOB) Hammer, and asporting the downloaded records, and information contained therein, to the accused's personal platforms or digital media outside the SCIF in his housing unit. The Government's theory is that

the accused knowingly converted the records, and information therein, in specifications 4, 6, 8, and 12 by sending them to WikiLeaks.

10. The value of the information the accused is alleged to have SPKC in specifications 4, 6, 8, 12, and 16 may be considered to determine whether the value of the charged database, records, or information therein, is over $1000.00. That said, the accused is not charged in specifications 4, 6, 8, 12, or 16 of Charge II with SPKC any of the database management systems, infrastructure, or software. As amended, the accused is not charged with SPKC the entire databases in specifications 4, 6, and 16 of Charge II.

11. The Government argues that the databases, records, and information in these specifications would not exist without the database management system, infrastructure, and software. The Government proposes the value of the cost of creating and maintaining the database management system, infrastructure, and software as a basis to value of the databases, records, and information therein, for specifications 8 and 12 of Charge II. The Government further proposes to establish the value for the records, and information contained therein, by establishing the value of a pro rata share of the cost of creating and maintaining the database management system, infrastructure, and software for the databases in those specifications. A similar argument could have been advanced in *U.S. v. May,* 625 F.2d 186 (8th Cir. 1980) to allow the Government to value the converted flight time by valuing the cost and maintenance of the airplane itself, because the converted flight time couldn't exist without the existence of the airplane. The Government has proffered no authority where a court has allowed the Government to equate the value of a database, records in a database, or information therein, SPKN by an accused or defendant with the value of the cost of creating and maintaining the database management system, infrastructure, or software. This is a case of first impression in the volume of database records, and information therein, alleged to have been SPKN by an accused or defendant. If the accused downloaded 10 records from one of the databases alleged in the 18 U.S.C. §641 specifications, the 10 records would also not exist without the database management infrastructure, system, and software. The Government's proffer for relying on the value of the cost of creating and maintaining the database management system, infrastructure, and software to establish value of the databases, records, and information contained therein, relies on the volume of records allegedly SPKN by the accused. The Court further recognizes that the Government's amendments to specifications 4, 6, and 16 of Charge II after the presentation of the evidence to allege portions of the databases and USF-I GAL does not afford the Defense the opportunity to cross examine any of the valuation witnesses on the pro rata share of the databases or USF-I GAL or to present evidence regarding the pro rata share of the databases or USF-I GAL.

12. The Government may not base the value of the database, records, or information therein, for specifications 4, 6, 8, 12, and 16 on the value of the cost of creating and maintaining the database management system, infrastructure, or software. The Court will disregard all evidence presented of such value when acting as the fact-finder. The Government may present and argue thieves market evidence regarding the value of the database, records, and information therein, and on cost production evidence presented regarding the cost of creating the information in the charged databases and records, such as employee time and salary for data entry.

13. The Court reaffirms its 2 June 2013 ruling at AE 591 (Government Motion to Qualify Mr. Daniel Lewis as an Expert). The evidence presented by the Government of value in the thieves market in excess of $1000 for the records and information contained therein specifications 4, 6, 8, 12, and 16 of Charge II is some evidence of value under the RCM 917(d) to withstand a motion for a finding of not guilty.

14. The Court's ruling mitigates any prejudice to the accused resulting from the Government's amendments to specifications 4, 6, and 16 of Charge II. The Defense motion for a mistrial as to those specifications is denied.

15. The Court has examined the testimony and evidence identified by the Government in part B(1-5) of its brief (AE 599) admitted to prove each of the elements for specifications 4, 6, 8, 12, and 16 of Charge II. The evidence presented by the Government together with all reasonable inferences and applicable presumptions, viewed in the light most favorable to the Government, without an evaluation of the credibility of the witnesses, could reasonably tend to establish every essential element of specifications 4, 6, 8, 12, and 16 of Charge II.

Ruling:

1. The Defense Motions for a Finding of Not Guilty for specifications 4, 6, 8, 12, and 16 of Charge II is **DENIED**.

2. The Government motion to amend specifications 4, 6, and 16 of Charge II is **GRANTED**.

3. The Defense Motion for Mistrial is **DENIED**

4. The Government may not base the value of the charged databases, records, or information therein, on the value of creating or maintaining the database management system, infrastructure, or software. The Court will disregard such evidence presented as the fact-finder. The Government will not refer to such evidence in closing argument.

So **Ordered** this 24th day of July 2013.

//Original Signed//
DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit